No. 835

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF SCRANTON AND MILTON J. SHAPP, *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEES THE PENNSYLVANIA RAILROAD COMPANY AND THE NEW YORK CENTRAL RAILROAD COMPANY TO AFFIRM

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Appellees The Pennsylvania Railroad Company (Penn) and The New York Central Railroad Company (Central) respectfully submit that the final judgment of the District Court dismissing the complaints of appellants City of Scranton and Milton J. Shapp was correct and should be summarily affirmed.

STATEMENT

Appellants Shapp and Scranton first sued to block the Penn-Central merger in September 1966 in the Southern District of New York. The District Court, in its decision of October 1966 (259 F. Supp. at p. 972), held that their arguments were so lacking in substance that they had no reasonable prospect of success upon a final hearing. In the

ensuing appeal to this Court both Shapp and Scranton filed extensive briefs in support of their position, and both were permitted to participate in oral argument. Although the Court's opinion did not pass upon their contentions, four Justices expressed concurrence in the District Court's view of the contentions in the following terms (386 U. S. at p. 464):

> "Certainly, there is no tolerable basis for our attacking the merger on its merits. To do so would be to substitute our judgment for that of the Commission on grounds which, to say the least, are speculative and based upon the claimed superiority of competing economic considerations. We are not at liberty to do this, and if we were free to do so, it would require a high degree of intrepidity on such a basis to overturn a result which, even if we assume its imperfections, generally incorporates a significant step in a direction which national policy has sought for several generations. This is Congress' responsibility, and the task, not of the courts, but of Congress' designated instrumentality, the ICC. The national need to refurbish and revitalize rail communications is urgent—some say of desperate urgency. The ICC has found that the merger here will result in economies and efficiencies aggregating $80,000,000 annually by the eighth year, which it asserts will enable the roads to effect the badly needed modernization of their facilities."

Since that time the efforts of Shapp and Scranton have been bent toward avoiding at all costs a final hearing on the merits in the jurisdiction that they themselves originally selected. After having given them every opportunity to pursue their claims, and with ample prior warning of the consequences of failing to do so, the District Court ultimately dis-

missed their complaints with prejudice for failure to comply with the Court's procedural directives, adding that it found no merit in the complaints.

The action of the District Court of which appellants complain was taken under the following circumstances:

On June 12, 1967, the Interstate Commerce Commission issued an order (dated June 9, 1967) promulgating final protective conditions for Erie-Lackawanna Railroad Company (E-L), The Delaware & Hudson Railroad Corporation (D&H) and Boston & Maine Corporation (B&M) pending their inclusion in a larger rail system, and reaffirming its prior orders authorizing prompt consummation of the Penn-Central merger. (330 I. C. C. 328) On the same date the Commission issued its order in the Norfolk and Western Railway Company (N&W) Inclusion case. (330 I. C. C. 780)

On June 19, 1967, Penn and Central moved the New York District Court, which had earlier enjoined the consummation of their merger pending the completion of the proceedings directed by this Court in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372 (1967), for an order directing all plaintiffs to file amended complaints setting forth their surviving contentions in light of the Commission's action, so that the entire matter could proceed expeditiously and efficiently to find determination in accordance with this Court's expectation.

On June 26, 1967, the day prior to that fixed for responses to the Penn and Central motion, the Borough of Moosic, Pennsylvania, filed a complaint in the Middle District of Pennsylvania challenging both the Penn-Central merger and the Inclusion order. Moosic, a suburb of Scranton, had never prior thereto participated, either in the Commission or the courts, in the more than five years of litigation over the Penn-Central merger. Insofar as it attacked that merger, Moosic's complaint was substantially identical to

those that had been filed by Shapp and Scranton in New York some nine months previously. And among the counsel representing Moosic were both counsel who had argued in behalf of Shapp and Scranton in this Court on appeal from the prior New York decision.

On June 27 Shapp and Scranton filed a statement of opposition to the Penn and Central motion, claiming that the Court could not properly require them to file supplemental complaints and asserting their intention to withdraw from the New York proceeding and intervene in the Moosic case. A number of other plaintiffs also opposed the motion. On July 3, the District Court issued an opinion overruling the objections and granting the motion, expressing the view that:

> "The idea that litigants challenging an order of a federal administrative agency may invoke the jurisdiction of one federal court, require it to expend its energies in becoming familiar with the subject matter, obtain interlocutory relief against enforcement of the order, and then take their grievances to another federal court which they consider may be more favorable while their complaints remain pending for final disposition, does not commend itself in general; and surely this case, where expedition is so important, will be the last one in which to countenance proceedings of that sort."

The Court directed that any plaintiff failing to file a supplemental complaint by July 17, 1967, would in the absence of a showing of good cause suffer dismissal with prejudice.

On July 13, 1967, the Pennsylvania court in which the Moosic suit had been brought (and where Shapp and Scranton had intervened) issued an order staying all proceedings in that court until after the date set by the New York Court for final hearing in the Penn-Central merger case. With

respect to the appellants here the Pennsylvania court specifically warned that "* * * consequences may be applicable to Mr. Shapp and the City of Scranton if they fail to press their claims in the New York federal court since they have been parties to that proceeding for almost a year."

By July 17, all of the New York plaintiffs who had objected to the Penn and Central motion except Shapp and Scranton had filed supplemental complaints in the New York Court.[1] On that date Shapp and Scranton filed a motion to stay all proceedings in the New York Court in favor of the Moosic suit (despite the fact that the latter suit had already been stayed in favor of the New York proceeding) and in the alternative for dismissal of their complaints without prejudice to enable them to proceed in the Moosic case. On July 26, the New York Court denied the motion, stating that:

> "The movants have shown no sufficient cause why, having invoked the jurisdiction of this Court where this litigation has been centered, they should now be allowed to present the self-same issues to another district court which has thus far had no occasion to occupy itself with their problems."

The Court gave Shapp and Scranton still another opportunity to comply with its directive, by extending the time for them to file supplemental complaints or suffer dismissal until August 2, 1967. The Court also stated that it would grant Moosic leave to intervene at any time prior to that date.

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[1]These were N&W, The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Western Maryland Railway Company and Reading Company. E-L and D&H, which had not objected to the motion, also filed supplemental complaints. Each of these plaintiffs thereafter had the opportunity to, and did, participate fully in briefing and oral argument before the District Court—N&W, E-L and D&H in both the Penn-Central and Inclusion cases.

Shapp and Scranton—and Moosic as well—declined to take advatnage of the Court's invitation.[2] On September 19 the Court heard oral argument in the Penn-Central case, and on September 28 in the N&W Inclusion case. And on October 19 the Court, in a final decision rejecting challenges to the Commission's Penn-Central Merger order from a variety of sources and also affirming the Commission's Inclusion order, directed a dismissal of Shapp's and Scranton's complaints with prejudice.

ARGUMENT

When the Commission issued its orders dated June 9, 1967, in this case and in the N&W Inclusion case, there immediately arose, as the Court below noted, "the threat that these related orders would become the subject of litigation in six or more different district courts * * *." (B&O J. S., p. B-4). Such a result would have been wholly inconsistent with this Court's recognition, expressed in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372, 392 (1967), of the importance of an expeditious determination of these matters. It was avoided because of what the District Court characterized as the "sober second thought of most counsel" (B&O J. S., p. B-4) and because of the procedural steps taken by courts in three different judicial circuits whereby the entire litigation was focused in the Southern District of New York.[3] Appellants are here be-

[2]On August 2, 1967, Shapp and Scranton filed in the New York Court instead of supplemental complaints a document entitled "Formal Objections to Order to Plead or To Suffer Dismissal With Prejudice."

[3]In addition to the already described steps taken by the New York and Pennsylvania courts, the District Court for the Western District of Virginia, where N&W had brought suit attacking the Inclusion order, found that "the issues raised in this action should be litigated in the United States District Court for the Southern District of New York" and set a schedule for proceedings which was designed to—and which did—result in the action being so litigated.

cause they alone, of all the parties to this complex litigation, refused to accede to and comply with the court orders designed to assure expeditious review in this manner. Their argument that the District Court was powerless, after they had invoked its jurisdiction and found it unreceptive to their position on the merits, to prevent them from withdrawing from that jurisdiction in order to sue in another court finds support in neither reason nor authority.

I. The District Court Did Not Lack Authority to Direct Appellants to File Supplemental Complaints

Appellants' claim of error as to the action of the District Court in requiring them to proceed or be dismissed with prejudice is made both in terms of lack of power and abuse of discretion. So far as the question of power is concerned the appellants' argument is that the complaints that they filed in New York in September 1966 were directed against the Commission's orders dated April 6 and September 16, 1966; that these orders were wholly superseded by the Commission's order dated June 9, 1967; and that their original suits thereupon became moot so that the Court's order was not one merely requiring them to proceed with a suit already brought, but was a wrongful attempt to compel them to bring an entirely new suit.

This contention misconceives the nature and relationship of the Commission's three successive reports and orders in this case. It is the report and order of April 6, 1966 (327 I. C. C. 475), and only that report and order, that passed on the basic objections with which appellants challenge the propriety of the merger, that made the fundamental determination of public interest required by the statute and that provided the approval and authorization of the merger of Central into Penn and the acquisition by Penn through the merger of control of Central's subsidiaries and affiliates

and trackage and other rights of Central in other carriers. Again it was the April 6, 1966, report and order alone that passed on and gave the authorization for the stock issues and related transactions required by the plan of merger, an authorization without which the merger could not take place. The subsequent reports and orders dated September 16, 1966 (328 I. C. C. 304), and June 9, 1967 (330 I. C. C. 328), merely supplemented, and did not supersede, the basic report and order. Thus the September order does not even repeat the authorizations of the merger made in the April order, but rather deals solely with events occurring, and applications and arguments made, following entry of the original order. The June 1967 order states on its face that it is a "Supplemental Order on Reconsideration." Neither it nor the supplemental report to which it is appended is addressed to the sole contention made by Shapp and Scranton which is not that the Penn-Central merger should be deferred pending resolution of certain contingencies but that it should never be permitted to take place, or to the many arguments offered in support of that contention.

It is particularly curious to find counsel for Shapp and Scranton contending that the 1966 Commission orders are moot in light of their actions in the suit filed by the Borough of Moosic in the Middle District of Pennsylvania. The complaint in that case, which was not filed until June 26, 1967, well after the time appellants now claim the 1966 orders of the Commission became moot, recites in its first paragraph that "This is an action to enjoin, annul, suspend, or set aside orders of the Interstate Commerce Commission dated April 6, 1966, September 16, 1966, and June 9, 1967 * * *." The complaint is signed by counsel for both Shapp and Scranton in the New York Court, acting as counsel for Moosic. And Shapp and Scranton, in intervening in the Moosic action, adopted as their own this

allegation as well as substantially all the other allegations of the Moosic complaint.

For these reasons the District Court was plainly correct in holding in its opinion of July 3, 1967, that "the subject of the complaints [filed in September 1966] was the Commission's approval of the merger as it then stood or as it might stand in the future," and that these complaints were not mooted by the supplemental order of the Commission in June 1967.[4] And given the correctness of this ruling, there can be no doubt of the District Court's power to implement it by requiring appellants to proceed or suffer dismissal with prejudice (*In re Georgia Power Company*, 89 F.2d 218 (5th Cir.), *cert. denied*, 302 U.S. 692 (1937); *Agnew* v. *Moody*, 330 F.2d 868 (9th Cir.), *cert. denied*, 379 U. S. 867 (1964); F. R. Civ. P. 41(b)), particularly when appellants' obvious motive was to avoid a forum that had expressed an unfavorable opinion as to the merits of their position (*Southern Maryland Agricultural Ass'n* v. *United States*, 16 F.R.D. 100 (D. Md. 1954)).

II. The District Court Did Not Abuse Its Discretion In Dismissing Appellants' Complaints With Prejudice When They Refused to Comply With Its Valid Procedural Order

Appellants urge that even if their complaints in the New York Court were not moot, that Court abused its discretion in declining to permit them to dismiss those complaints without prejudice. The contention is that appellants should have

[4] Sierra Pacific Power Co. v. FPC, 223 F. 2d 605, 609 (D. C. Cir. 1955) and its sequels, cited by appellants, are not in point. In that case the court had annulled and set aside a Federal Power Commission order, and thus there was no question but that the suit challenging that order had ended. Here, in contrast, the April and September 1966 orders of the Commission were not annulled or set aside, but rather were only temporarily enjoined pending the resolution of certain contingencies which were resolved by the Commission's orders dated June 9, 1967.

been permitted to depart from New York in order to litigate in Pennsylvania because the Penn-Central and Inclusion orders were "inextricably interwoven" and their complaints in the Moosic litigation in Pennsylvania attacked both orders. (J. S., p. 4)

Appellants cannot claim that they were prevented, or indeed that any court or any party ever even sought to prevent them, from challenging both the Penn-Central and the Inclusion orders in New York. In fact the New York and Pennsylvania courts, and the parties supporting the orders, expressly invited appellants to challenge both orders in New York, and the defendant United States offered appropriate waivers of venue to facilitate their doing so. And had appellants wished to file in New York complaints precisely like their intervening complaints in Pennsylvania, which challenged both the Merger order and the Inclusion order in a single document, there was nothing to prevent their taking such action.

Appellants' complaint thus comes down to the fact that the New York Court established separate briefing schedules and argument dates for the two cases. This action in no sense implied a determination that the two cases were not closely related. The Court no less than appellants was aware of that relationship. Indeed, it was its awareness—and the awareness of the Pennsylvania and Virginia courts—of the relationship that caused them each to take action to facilitate determination of both cases in the forum where the litigation had begun and which had the most familiarity with its subject matter. The fixing of dates for briefs and argument was a housekeeping detail. The schedule as established was not designed to preclude any party from asserting in whatever detail it chose, on brief and in oral argument, any alleged relationship between the Merger and the Inclusion cases, nor the Court from exploring any such

relationship. It proved not to prevent any other party or the Court from dealing with the relationship, and there is no reason to believe it would have prevented appellants from doing so.

That appellants' present position is one dictated by exigency rather than conviction is strongly suggested by comparing it with their position before the Commission as recently as May 9, 1967. At that time there was pending before the Commission a petition of Reading Company to consolidate for decision four railroad unification cases, including the Penn-Central Merger and N&W Inclusion proceedings. In response to that petition, appellant Scranton urged that such a consolidation "standing alone, would both continue *as well as aggravate* the prejudice to City of Scranton" (emphasis added), and expressly asked that unless the Commission were willing to grant further evidentiary hearings in all the cases, the petition for consolidation for decision be denied. (See Reply and Petition of Scranton in Finance Dockets No. 21510, 21989, 23178 and 23832, *et al.*, filed May 9, 1967, pp. 2, 28) It is difficult to understand how appellants, having believed a consolidation for decision in the Commission to be prejudicial to their interests, can claim that a similar consolidation in the District Court was vital to the protection of those interests.

Under these circumstances the action of the District Court dismissing appellants' complaints with prejudice by reason of their failure to comply with the Court's order to supplement their pleadings was, far from being an abuse of discretion, plainly correct.

III. The District Court Correctly Concluded That the Complaints of Shapp and Scranton Are Without Merit

The District Court unanimously concluded that apart from the procedural grounds discussed above, dismissal of the Shapp and Scranton complaints was justified by the fact

that they were without merit. In reaching this conclusion, the Court was able to consider extensive briefs filed by Shapp and Scranton in support of their claims in September 1966. The questions presented by the complaints raised solely issues of law.[5] Because a case of this kind does not involve a trial *de novo* the issues may properly be determined by summary judgment and no findings of fact are required. (*National Broadcasting Co.* v. *United States,* 47 F. Supp. 940 (S. D. N. Y. 1942), *aff'd,* 319 U. S. 190 (1943))

Throughout this proceeding, including the prior hearing in this Court, appellants have argued that certain findings of the Commission are not supported by substantial evidence. These arguments are largely addressed to the Commission's findings on the financial position of Penn and Central and their prospects for profitable operation. Analysis of these arguments shows that they are either predicated on a misreading of the Commission's reports or are directed in fact not to the absence of substantial evidence, but rather to the weight that is to be given to, or the inferences that are to be drawn from, the evidence.

The Commission did not, as appellants suggest (J. S., p. 15), rest its decision on the ground that Penn and Central were "failing" companies. On the contrary the Commission expressly stated that "the provisions of section 5(2) of the act do not require an applicant to show penury or danger of imminent bankruptcy before a transaction it proposes can be approved." (327 I. C. C. at p. 494) The Commission did find that "Since 1952, applicants' rates of return have been too low to generate confidence in their financial soundness, to maintain credit, and to raise funds

[5]This was no less true of the questions framed in terms of whether the evidence supporting particular findings of the Commission was "substantial" than of any of the other questions raised. (Dredge Corp. v. Penny, 338 F. 2d 456 (9th Cir. 1964); Marion County Coop. Ass'n v. Carnation Co., 214 F. 2d 557 (8th Cir. 1954))

necessary for the discharge of their public duties" (*id.* at p. 500), and this finding was fully supported by undisputed evidence.

Appellants' assertion that the Commission's decision rests on assumptions that Penn and Central "will face a continued decline in output" and that "the record shows no reason for optimism on applicants' traffic level" (J. S., p. 15) is not an accurate description of the aspect of the Commission's decision that appellants criticize. What the Commission in fact did was to reject as unsound appellants' argument that it should be assumed that in the future there would be a substantial improvement in the traffic position of the applicants which would necessarily lead to a substantial improvement in the financial results of their transportation operations—an argument that appellants rested on certain projections relating to the rate of increase in economic activity in general which it was asserted would in turn lead to increased traffic and increased profits for the applicants.

In rejecting this argument the Commission found that even accepting appellants' projections as to the general level of economic activity "there is no assurance in this record that the applicants' prosperity will keep pace with that of the nation as a whole. Historically they have failed to do so." (327 I. C. C. at p. 495) It found that there was no warrant for assuming that "improved 1964 and 1965 incomes establish an unquestionable trend toward permanent improvement in applicants' finances." (*Id.* at pp. 495-96) It further found that because it was making a decision that would have long term consequences it could not reasonably close its eyes "to the very real danger that our economy may not always be as active and healthy as it is today" since "even an expanding economy pauses occasionally to consolidate the gains of past growth." (*Id.* at pp. 497-98) It noted that railroading is "a cyclically sensitive industry"

and that railroads because of their large fixed plant and relatively constant costs "are among the industries first to suffer loss of income in periods of business recession." (*Id.* at p. 498)

That the Commission's decision did not depend on any unwarranted assumptions of pessimism is shown by the fact it declared that "it is not a legal impediment that the merger candidates find business good" (*id.* at p. 498), and stated that the matter requiring more serious consideration than the increase in income of Penn and Central after the close of the hearings was "whether the return they receive for capital expended is sufficiently attractive to insure their continued efforts toward improving railroad service, providing jobs for their employees, and discharging their transportation obligations to the public" (*id.* at p. 499).

Appellants have emphasized the improvement in the financial condition of the two railroads in 1964 and 1965 and assert that this improvement should be given decisive weight. The Commission was aware of this improvement but declined to regard it as controlling.[6] The Commission pointed out that even in 1964 and 1965 the return earned on investment by the two roads was low as compared with that earned by other industrial enterprises and even lower than

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[6]See also the opinion of the District Court (B&O J.S., p. B-9 n. 6): "The criticism that the Commission did not give adequate weight to the improved earnings of PRR and NYC during the course of the merger proceedings has been shattered by the results for the first half of 1967."

In the first nine months of 1967, Central has reported a small net railway operating income *deficit*, as compared to net railway operating income of $42,115,933 during the comparable 1966 period. Penn in the first three quarters of 1967 had net railway operating income of $6,021,867, as compared with $42,016,036 of such income during the first three quarters of 1966. These sharp declines have taken place in the face of an increase in the Gross National Product, as reported by the United States Department of Commerce on a seasonally adjusted basis at the close of the third quarters in 1966 and 1967, from $748,800,000,000 to $791,200,000,000.

the return on Government bonds. (327 I. C. C. at pp. 498-501)

Appellants have also asserted that the Commission accepted erroneous projections of traffic volume for the future, pointing out that whereas in those projections it was estimated that Penn and Central freight traffic would amount to 69,000,000 ton miles in 1965, the witness Keyserling (counsel for Scranton on the prior appeal) correctly estimated that traffic volume would rise to 89,000,000 ton miles in that year. The validity of the Commission's findings that the proposed merger will be in the public interest does not turn upon the accuracy of a traffic projection for one year. Indeed it does not depend upon acceptance of the traffic projections for a longer period of time made by the two applicant railroads nor does it require the rejection of the conflicting projections offered by the opponents of the merger. The Commission made this plain in its initial report where, as noted above, it observed that even if it accepted the economic projections of the Department of Justice and certain Pennsylvania communities including Scranton "there is no assurance in this record that the applicants' prosperity will keep pace with that of the nation as a whole. Historically they have failed to do so." (327 I. C. C. at p. 495) The Commission's findings with respect to the financial prospects of the two applicant railroads were based primarily on undisputed facts with respect to their rates of return on investment and, as we have pointed out, the Commission found that even in 1964 and 1965 those rates of return were so low as to create doubts about the capacity of the two carriers to continue to provide the kind of common carrier service that the public interest requires.

Appellants have asserted that in approving the merger the Commission acted to curtail overall railroad capacity

in line with the allegedly erroneous traffic projections referred to above. (See *e.g.*, the Brief filed by Shapp in this Court on the prior appeal, p. 19) The Commission in fact found that the merger would improve the applicants' ability both to provide transportation services needed by a growing economy and to perform their transportation obligations during periods of economic pause or recession. The merger, the Commission said, would "open the way for the development of a modernized railroad system trimmed of unnecessary plant, unencumbered by service obligations no longer responsive to the public needs, and free and able to grow as and where the Nation's transportation requirements dictate. Mergers are not for shrinkage any more than the pruning of a fruit tree is for reducing the yield of fruit." (327 I. C. C. at p. 496) Contrary to appellant's assertions the Commission found that the merger would create new capacity (*id.* at pp. 489-92), would "motivate the unified company to accelerate investments in transportation property and continually modernize plant and equipment" (*id.* at pp. 501-02), and would prevent substantial disinvestment of funds which would impair the applicants' ability to modernize and improve services essential to economic growth (*id.* at pp. 499-501).

The arguments with which appellants have attacked the Commission's approval of the merger as not based on substantial evidence are, as the District Court recognized, in reality essentially arguments that the Commission erred in deciding questions of economic policy that are committed to its judgment. Thus appellants have in various of their briefs asserted that the Commission adopted a "doom and gloom philosophy" (Scranton S. D. N. Y. Brief, Sept. 1966, p. 3); that the merger is "in conflict with the National Policy of maximum employment, production and purchasing power * * *" (*id.* at p. 8); that the present state of the

country's economy does not "warrant a contraction of railroad facilities" (Shapp S. D. N. Y. Brief, Sept. 1966, p. 19); that the Commission has failed to appreciate "the transportation needs of a *big* country" (Keyserling Affidavit on Application for Stay, p. 2); and that the Commission was led astray by a "concept of boom and bust" (*id.* at p. 5). These and similar arguments do not demonstrate either that the Commission's findings are insufficient or that they are unsupported by substantial evidence. They are arguments that simply quarrel with the Commission's appraisal of complex questions of public policy and transportation economics that Congress has authorized it to decide. This Court has held that within this area of judgment the wisdom and experience of the Commission and not of the courts must determine whether a proposed merger is consistent with the public interest. (*McLean Trucking Co.* v. *United States,* 321 U. S. 67, 87-88 (1944); *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173, 188 (1959))

The final "question of fact" mentioned by Shapp and Scranton is whether "the merger will benefit rather than harm Pennsylvania." (J. S., p. 15). The short answer is that the Commonwealth of Pennsylvania does not need or seek the representation of Shapp and Scranton on this score. The Commonwealth itself appeared on the prior appeal in this case to argue that it will benefit from the merger and that the Commission's orders should be sustained. Under these circumstances appellants have no right or standing to assert injury to Pennsylvania.[7]

The allegations that appellants characterize as presenting "issues of law" are equally unmeritorious. Appellants assert that the Commission adopted an erroneous definition

[7]In its initial report the Commission summarized the evidence that supports its finding that the merger "will benefit rather than harm the Commonwealth." (327 I. C. C. at pp. 492-93)

of the "public interest" and as a result ignored or did not adequately consider certain of their objections to the merger. This assertion rests on a passage in the proposed report of the Examiners which it is contended the Commission adopted and affirmed. (Proposed Report, at pp. 280-83; 327 I. C. C. at pp. 481-82) In that passage the Examiners adopted, as they were obliged to do, the definition of the term "public interest" in Section 5(2)(b) that was enunciated by this Court in *United States* v. *Lowden,* 308 U. S. 225, 230 (1939), and *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 25 (1932). In compliance with that definition the Examiners held that in appraising "the public interest" the Commission was limited to considering matters that related to the adequacy and efficiency of transportation services and facilities. The Examiners made this holding in rejecting arguments that the merger should be disapproved (1) because it might reduce tax receipts and thus hamper the conduct of public functions by certain governmental bodies and (2) because by diminishing employment to railroad workers residing in certain areas it might have repercussions on business supplying goods and services to such workers. (Proposed Report, at p. 281) The Examiners said (*id.* at p. 282):

> "The Interstate Commerce Commission, while having broad jurisdiction in the regulation of railroads generally, is confined by its statutory authority in considering 'the public interest' as it applies to the 'adequacy of a transportation service', and it has no authority to guarantee a certain level of employment at a particular location, nor to gauge or consider the effect which divestment by railroads at a given point would have upon the taxing structure of particular states, counties, communities, or other political subdivisions.

> "It is eminently clear that neither the taxing structure, the level of employment in any given area, nor other arguments running to these essential questions bear any relationships to transportation, nor can we find any provisions of the act or in its legislative history that permits us to measure the impact of the proposed merger in relationship to such effects upon economic political or geographic areas or individual businesses located therein."

The Examiners committed no error of law in this holding. Appellants have never disputed that the holding was fully justified by the decisions in *Lowden* and *New York Central Securities Corp., supra.* Their argument rather has been that since these cases were decided the Transportation Act of 1940 and certain other federal statutes have amended and extended the public interest standard of Section 5(2)(b). There is nothing in this contention. The cases decided under Section 5(2)(b) since the Transportation Act of 1940 was passed make it plain that the Act did not change in any respect the public interest standard of Section 5(2)(b). (See *Brotherhood of Maint. of Way Employees* v. *United States,* 221 F. Supp. 19, 25 (E. D. Mich.), *aff'd per curiam,* 375 U. S. 216 (1963); *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 83 (1944); *Schwabacher* v. *United States,* 334 U. S. 182, 193 (1948))
Indeed, the Supreme Court has said that the 1940 Act changed "the means" but not "the end" which the Commission is authorized to achieve. (*County of Marin* v. *United States,* 356 U. S. 412, 416 (1958))

No elaborate discussion is necessary to dispose of the suggestion that appellants have made that the Employment Act of 1946, the Area Development Act of 1961, the Manpower Development and Training Act of 1962, the Economic Opportunity Act of 1964, the Appalachian Regional

Development Act of 1965 and the Mass Transportation Act of 1966, considered collectively or individually, amended the public interest standard of Section 5(2)(b) or otherwise extended the powers of the Interstate Commerce Commission. That suggestion cannot survive even a cursory reading of the provisions of those statutes.

The Commission's consideration of the interests of areas and communities complied with the standards of Section 5(2)(b). Both the Examiners and the Commission considered the effects of the proposed merger on the adequacy and the efficiency of the transportation services and facilities that would be available to particular areas, states and communities and made adequate and appropriate findings on those effects. (See Proposed Report, at pp. 229-86 and particularly pp. 283-86; 327 I. C. C. at pp. 491-93) The Commission did not commit any error of law by thus confining its attention to the transportation aspects of the proposed merger.

In the prior appeal in this Court Shapp argued at length (Shapp Brief, pp. 26-30), and Scranton appeared also to assert (Scranton Brief, p. 12), that the Commission erred in applying a "broad 'public benefits' test," rather than the statutory "public interest" test in directing an opportunity for inclusion of the New Haven in the merged Penn-Central. In making this argument, these appellants seized on the fact that the Commission in discussing the merits and timing of the merger both in its original report and its report on reconsideration on occasion referred to "public benefits" and "benefits to the public" rather than "public interest." (See, *e. g.*, 328 I. C. C. at p. 306) It is apparent, however, from a reading of the pertinent passages that in employing the former terms the Commission was in no way indicating its adherence to a standard different from the statutory standard.

In connection with their argument on the prior appeal, Shapp and Scranton urged that the Commission, in finding that the opportunity that the merger offered for a solution of the problems of the New Haven was a factor militating strongly toward its approval, *must* have applied a "public benefits" standard that was different from the "public interest" standard. (Shapp Brief, pp. 26-30; Scranton Brief, pp. 12-13) The premise of this argument appears to have been that the Commission could not properly have found inclusion of the passenger and freight operations of the New Haven in the Penn-Central system to be in the public interest because that inclusion would allegedly require "citizens of states lying between the Mississippi and Hudson Rivers to subsidize the passenger operations in New England" in the teeth of a "firm Congressional policy", claimed to be expressed in the Transportation Act of 1958, "that passenger service is not to be subsidized by the shippers of freight." (Shapp Brief, pp. 28-30) This argument is wholly without merit. Even assuming the correctness of appellants' characterization of the policy of the Transportation Act of 1958, an inclusion of New Haven's operations in the Penn-Central system would in no way be inconsistent with that policy. The merged Company, no less than the present New Haven, would be free to take advantage of the Transportation Act of 1958 to the extent authorized by the terms of that statute, and the Commission expressly emphasized that the merger savings should not and would not be permitted to be a subsidy for the New Haven passenger operations. (327 I. C. C. at pp. 523-25)

Appellants raise as another "issue of law" a contention that the Commission did not make adequate findings on the competitive consequences of the merger and did not properly appraise the merger in the light of the policy of the antitrust laws. This argument does not require extensive dis-

cussion. Both the Examiners in their proposed report and the Commission in its reports considered in detail the competitive consequences of the merger and in the course of that consideration gave appropriate weight to the policies of the antitrust laws and to the concepts that have been developed in antitrust decisions for measuring the effect of mergers on competition. (See Proposed Report, at pp. 160-75, 176-95, and particularly pp. 419-39; 327 I. C. C. at pp. 502-20; 328 I. C. C. at pp. 309-10)

Appellants have asserted that there is a distinction between "carrier competition" and "market competition," described as competition that exists when two carriers serve a common consuming market from different points of origin, and argue that the Commission failed to consider "market competition." (Shapp Brief on prior appeal, pp. 31-33; J. S., p. 16) The argument rests upon an incorrect reading of the Commission's report. The Commission specifically said that it was not confining its attention to the competition afforded by Penn and Central between common points of origin and destination but on the contrary was considering competition in terms of "origin, destination or bridge service" (327 I. C. C. at p. 509. See also *id.* at pp. 512-14)

Appellants have made no concrete claim that the Commission failed to give adequate consideration to the effect of the merger upon "market competition" in any specific product or specific geographical area. As the Commission declared, the merger applicants participate "in the transportation of practically the entire gamut of commercial commodities, originating and terminating in virtually all sections of the country, and at overseas points as well." (327 I. C. C. at p. 510; 328 I. C. C. at p. 309) It can hardly be contended that the Commission was required to make formal findings as to the competitive consequences of merger for each product transported by the two carriers in each geo-

graphical area served by them, and appellants have never suggested that they or any other party to the Commission's hearings introduced evidence as to market competition in particular commodities which the Commission failed properly to appraise.

The Examiners also considered at length and rejected the argument that the merger was objectionable because interlocking directorates between Penn-Central, on the one hand, and large commercial corporations not engaged in transportation activities, on the other, might create possibilities for the practice of reciprocity. (Proposed Report, at pp. 93-100) The Commission adopted these findings and conclusions of the Examiners. (327 I. C. C. at pp. 481-82)

In its opinion of October 1966 denying the motions for a temporary injunction the District Court held that the initial report of the Commission "fully complied with the directions of the Supreme Court in such recent decisions as *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173, 186 (1959), and *Seaboard Air Line R. Co.* v. *United States,* 382 U. S. 154 (1965)." (259 F. Supp. at pp. 966-67) We submit that this holding was a plainly correct disposition of the contention that the findings of the Commission are deficient in their treatment of competition and related antitrust problems, and should be confirmed by this Court.

Other objections mentioned by Shapp and Scranton here or in their earlier pleadings are adequately answered by the Commission's own discussion and findings, as, for example, the contention that the Commission erred in not prescribing conditions to protect the employees of other carriers (328 I. C. C. at pp. 313-14); the contention that the Commission did not make adequate findings with respect to the impact of the proposed merger upon the national defense and the postal service (327 I. C. C. at p. 520); and the

contention that the Commission should have reopened the proceedings to receive certain new or additional evidence (327 I. C. C. at pp. 484-86).

CONCLUSION

For all the foregoing reasons, the judgment of the District Court dismissing the complaints of appellants Shapp and Scranton was clearly correct and should be summarily affirmed.

Respectfully submitted,

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